

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





ORIGINAL **76-7213**

*To be argued by*  
VICTOR S. CICHANOWICZ

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

AMALIA HERBIRA ZORIANO SANCHEZ, etc., et al.,  
*Plaintiffs-Appellants,*  
*against*

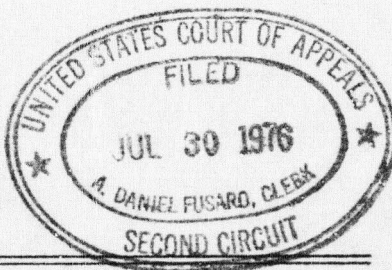
CARIBBEAN CARRIERS LIMITED, BORDAS DOMIN-  
ICAN CO., BORDAS & COMPANY AND BORDAS  
CORPORATION,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANTS-APPELLEES**

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*against*

CARIBBEAN CARRIERS LIMITED, BORDAS DOMINICAN Co.,  
BORDAS & COMPANY and BORDAS CORPORATION,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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## BRIEF OF DEFENDANTS-APPELLEES

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### Nature of Case

In this action the plaintiffs seek to relitigate the very issues which were litigated in the United States District Court for the District of Puerto Rico (35a-40a) and affirmed by the United States Court of Appeals for the First Circuit (135a-136a). It involves an action by the representatives of the estates of Dominican and Colombian seamen who were serving aboard the M/V CARIBE, a Dominican flag vessel, when on or about October 10, 1971 she was lost while on the high seas on a voyage from Barranquilla, Colombia to Santo Domingo in the Dominican Republic.

On motion of defendants Caribbean Carriers Limited, Bordas Dominican Co. and Bordas & Company to dismiss for lack of subject matter jurisdiction and forum non conveniens, the District Court for Puerto Rico on affidavits which were not contradicted by plaintiffs, dismissed the complaint with prejudice. In arriving at its determination, the District Court for Puerto Rico found that neither Caribbean Carriers Limited nor Bordas & Company owned or operated the M/V CARIBE but that at the time in question said vessel was owned and operated by Bordas Linea Dominicana, a Dominican corporation which had purchased the M/V CARIBE from Caribbean Carriers Ltd. on June 25, 1971. It also found that the substantial contacts between the transaction involved and the United States which are required in order to apply the Jones Act, 46 U.S.C. 688 to foreign flag vessels, did not exist. It further held that since the action involved a controversy between aliens to apply foreign law and a remedy was available in the home forums of the deceased seamen where the witnesses and documentary evidence was located, and the Courts in those forums were in a better position to compel disclosure of such evidence, jurisdiction was declined.

On appeal to the Court of Appeals for the First Circuit, plaintiffs conceded that on the facts presented the dismissal was justified. It was their contention that since the merits were not reached, the dismissal should not have been "with prejudice". In affirming the judgment of the District Court of Puerto Rico, the Court of Appeals struck the words "with prejudice" from the judgment but affirmed the judgment below. In so doing, it pointed out however that it did not in any sense mean to rule that the judgment should necessarily be construed as without prejudice.

On this appeal plaintiffs do not dispute the validity of the findings or conclusions reached by the District Court



of Puerto Rico. It appears to be their contention that the determination of the District Court of Puerto Rico was not on the merits because the ultimate issues of the litigation were not developed and passed on and they are therefore free to relitigate all issues even those which were determined in the prior litigation in this forum. The plaintiffs do not dispute that there is no material difference between the action which was instituted in Puerto Rico and the within action, except that in the within action they have alleged an additional ground for recovery against Caribbean Carriers Ltd. (pp. 19-20 of brief).

### **The Course of Proceedings and Disposition in the Court below**

The action in the Court below was commenced by the filing of a complaint on August 21, 1975 or some 3 years, 9 months and 11 days after the event out of which the causes of action alleged in the complaint occurred (3a). Service was attempted on all defendants by delivering copies of the summons and complaint to an associate attorney at the firm of Cichanowicz and Callan. Defendants moved to vacate the service of the summons and complaint and for a dismissal of the complaint on the grounds service was improper and the actions in any event were barred by res judicata and the statute of limitations and laches, and the complaint failed to state a claim upon which relief could be granted and lack of jurisdiction over the subject matter of the action.

Judge Duffy first noted that the pendency of the appeal in the Court of Appeals for the First Circuit was sufficient reason for the Court to decline to accept jurisdiction. He however held that since process was not properly served, it was not necessary to pass on the other contentions raised by defendants and accordingly dismissed for insufficiency of process. Furthermore, because in their opposition to the motion plaintiffs had urged that they had effected service

on Caribbean Carriers through International Trust Company in Monrovia, Judge Duffy held that Judge Toledo's finding in the District of Puerto Rico action that Caribbean Carriers did not own the vessel at the time of the accident, was binding under the principles of collateral estoppel (123a-126a).

Plaintiffs moved for reargument of the motion to dismiss (128a). Reargument was granted and Judge Duffy, after noting that the sufficiency of process was not the only reason for granting the motion, adhered to his original determination (129a).

Following the rendition of the affirmance by the Court of Appeals for the First Circuit, plaintiffs moved for an order requesting, amongst other things, that (1) they be given an extension of time to appeal; (2) the judgment of dismissal be withdrawn and plaintiffs be permitted to continue with their action in the District Court in New York; (3) they be permitted to serve subpoenas and take testimony showing that the ownership of the M/V CARIBE was American; and (4) other discovery be permitted (132a-133a).

While that application was pending undetermined, plaintiffs filed a notice of appeal followed by a motion in this Court for an order staying all proceedings on the appeal until a decision was rendered on the motion in the United States District Court for the Southern District of New York. Said application was denied. Plaintiffs thereupon moved for an order vacating the denial of the stay and a reconsideration of said application. Following oral argument this motion was also denied.

On April 19, 1976 Judge Duffy denied plaintiffs' motion requesting that they be permitted to proceed with the within action, conduct discovery to establish American ownership of the M/V CARIBE, and other relief (143a).



### The Relevant Facts

The plaintiffs are residents and citizens of the Dominican Republic. They bring this action as representatives of the estates of Dominican or Colombian seamen who were serving aboard the M/V CARIBE when she was lost while on the high seas on a voyage from Baranquilla, Colombia to Santo Domingo, in the Dominican Republic. At the time, said vessel was registered under the laws of the Dominican Republic and was flying the Dominican flag. She was owned by Bordas Linea Dominicana, a corporation organized and existing under the laws of the Dominican Republic (36a).

The crew were all either Colombian or Dominican seamen who had been hired either in the Dominican Republic or the Republic of Colombia (36a). One member of its crew was a Lieutenant from the Navy of the Dominican Republic (58a).

The chief executive and sole owner of Bordas Linea Dominicana was one Diego Bordas, a citizen and resident of the Dominican Republic (58a). Bordas Linea Dominicana had purchased the M/V CARIBE from Caribbean Carriers Ltd., a Liberian corporation on June 25, 1971 (30a-31a, 58a). The office of Bordas Linea Dominicana was located in the Dominican Republic (58a) and for more than one year prior to her loss at sea, the M/V CARIBE had not been in any United States port (36a-37a). The base of the ship's operations was in Santo Domingo, Dominican Republic (37a).

## POINT I

**The determination of the District Court was on the merits and is res judicata.**

At page 17 of their brief, plaintiffs assert that because the motion in the District Court of Puerto Rico was labeled as a "motion to dismiss for lack of jurisdiction" and no request was made in that action either for summary judgment under Rule 56 or judgment under Rule 12(b) of the Federal Rules of Civil Procedure of 28 U.S.C.A., the dismissal by the District Court of Puerto Rico is not on the merits and therefore not a bar to this action.

In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 357 (footnote 4) (1959), the United States Supreme Court held however that the inartistic labeling of a proceeding does not restrict the nature of the disposition which is actually made. In that case, as in the action in Puerto Rico, a motion was made to dismiss the complaint on the ground that the Court lacked jurisdiction over the subject matter of an action under the Jones Act by a foreign seaman against a foreign shipowner. In that action, as in the Puerto Rican action, the Court viewed the issues as jurisdictional but followed the procedure provided for a preliminary hearing to determine whether a claim was stated upon which relief can be granted as prescribed by Rule 12(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A. and considered evidence outside the pleadings in the form of affidavits which plaintiffs did not contradict. Under these circumstances, as the Supreme Court further pointed out, both Rule 12(b) as well as 12(c) of the Federal Rules of Civil Procedure 28 U.S.C.A. require the Court to treat the motion as one for summary judgment under Rule 56 and if, as in the action before the District Court of Puerto Rico the affidavits are uncontradicted, there is no genuine issue of fact, and the moving party is entitled to judgment as a matter of law. See also *Thomp-*

*son v. New York Central Railroad Company*, 361 F.2d 137, 144 (2 Cir. 1966).

Nor does the fact that the motion in the Puerto Rican action was made before answer affect the validity of the determination as *res judicata*. Whether it is considered as a motion for summary judgment or for judgment under Rule 12(b), it may be made before the service of a responsive pleading. *Schwartz v. Compagnie Generale Transatlantique*, 405 F.2d 270, 274 (2 Cir. 1968); Rule 12(b) Federal Rules of Civil Procedure, 28 U.S.C.A.

Nor is it necessary for an adjudication to be on the merits that the ultimate substantive issues of a litigation be passed on. In *Angel v. Bullington*, 330 U.S. 183, 190 this Court said:

"It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. \* \* \*

"The 'merits' of a claim are disposed of when it is refused enforcement."

Nor does the fact that in the within action plaintiffs assert a cause of action against Caribbean Carriers Ltd. on a ground which was not urged in the Puerto Rican action destroy the effectiveness of the decision of that court as *res judicata*. In *Saylor v. Lindsley*, 391 F.2d 965, 968 (2 Cir. 1968) this Court said:

"The general rule of *res judicata* is that a valid, final judgment, rendered on the merits constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. \* \* \*"



Since the plaintiffs were bound to set forth every ground of recovery on which they seek to rely in the Puerto Rican action, they are precluded by the decision of the District Court for Puerto Rico from asserting different or additional grounds in the within action, even if the additional ground could be accorded validity. *Vassos v. Societa Trans-Oceanica Canopus*, 143 F. Supp. 945, 946 (S.D.N.Y.) affirmed 272 F.2d 182 (2 Cir. 1959).

## POINT II

### **The ownership of a vessel is not dependent on its registry.**

The fact that the Commissioner of Maritime Affairs of the Republic of Liberia in New York City did not strike the M/V CARIBE from his records until October 22, 1971, is not a basis for voiding the sale of that vessel nor does it afford a basis for liability on the part of Caribbean Carriers Ltd. for the death of the decedents or for reopening the question of vessel ownership and flag. It appears to be well settled that registry statutes do not create title. The Supreme Court and various lower courts have held repeatedly that true ownership of a vessel is not dependent on its registry. *Stewart & Co. v. Rivera*, 274 U.S. 614, 618 (1927); *Hazey v. Buchanan*, 41 U.S. (16 Pet.), 215 (1842); *Southern Bell T & T Co.*, 62 F.2d 1015 (5 Cir. 1933).

Even assuming that the Geneva Convention of 1958 applies to Liberian flag vessels, though Liberia is not a signatory, Article 5 thereof does state that "Ships have the nationality of the State whose flag they are intended to fly." (18a)

In any event, the regularity or legality of a vessel's registry under the law of a foreign state or nation is not a matter with which the United States or its Courts are concerned. *Volkenburg v. Nederland-Amerik Stoomv. Moats*, 336 F.2d 480, 482-483 (1 Cir. 1964).

### POINT III

**The actions asserted in the complaint are barred by the statute of limitations and/or laches.**

The statute of limitations for actions under the Jones Act, 46 U.S.C.A. 688, is 3 years, *Engel v. Davenport*, 271 U.S. 33 (1926) and under the Death on the High Seas Act, 46 U.S.C.A. 761 et seq. two years. Both are a condition of the very right and not a mere limitation on the remedy and therefore cannot be extended. *In re Agwi Nav. Co.*, 39 F.2d 11 (2 Cir. 1937); *Batkiewicz v. Seas Shipping Co.*, 54 F. Supp. 789 (S.D.N.Y. 1944).

An action under the general maritime law of the United States is governed by the doctrine of laches. However, since it falls within the ambit of either the Jones Act or Death on The High Seas Act, it is governed by the limitation period of those statutes. *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 683 (2 Cir. 1971).

Section 360 of Title 22 of the Liberian Code of Laws, as amended, provides:

“TIME LIMIT.—(1) The following rights of action are subject to one year's prescription:

(a) Claims arising out of the Shipping Articles;

(2) The following rights of action are subject to two years' prescription:

(a) The right of action for death of a seaman caused by wrongful act, neglect or default on the high seas;

(b) Claims of the shipowner against the Master for acts committed during the performance of his duties;

(c) All other tort claims;

(3) All other claims are subject to three years' prescription.

(4) The period of prescription of the claims, laid down in the preceding subsections, runs from the time when the right of action accrues. (Eff. Aug. 18, 1964)."

Accordingly, since the within action was not commenced until some 3 years and 9 months after the causes of action alleged in the complaint accrued, they are barred by the statute of limitations and/or laches.

#### POINT IV

**The determination by the District Court of Puerto Rico on the subject matter and discretionary jurisdiction is binding.**

The motion which was before the District Court of Puerto Rico was not one dealing with a pre-condition of jurisdiction as it is characterized at page 22 of their brief or one to decline jurisdiction as it is made to appear at page 17 of the brief.

According to the District Court of Puerto Rico, the motion before it was to dismiss the complaint because the Jones Act did not sustain jurisdiction (subject matter jurisdiction) and to decline jurisdiction of the causes of action under the general maritime law (discretionary jurisdiction) (36a).

Thus, when at page 17 plaintiffs quote paragraph 5 of defendants' motion in the Puerto Rican action, they are setting forth only one phase of the motion.

When they state at page 22 that they "did not satisfy the Puerto Rican Court solely on the pre-condition of jurisdiction", they are confusing jurisdiction over the person of a party and jurisdiction over the subject matter. There was no question of jurisdiction over the person of



the defendants in the Puerto Rican action; and the Court's finding that none of the contacts which are required for the application of the Jones Act existed clearly demonstrates that it was not passing on a pre-condition of jurisdiction by jurisdiction over the subject matter of the action.

Since the principles of *res judicata* do apply to questions of jurisdiction, *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932), they are not open to relitigation in this action. In *United States v. Eastport Steamship Corporation*, 255 F.2d 795, 803 (2 Cir. 1958), the Court said:

"Issues of jurisdiction may be, as any other matter, the subject of *res judicata*, and having once litigated the jurisdiction of the Court of Claims, the Government is precluded from doing so now."

On the question of *forum non conveniens*, the plaintiffs also are bound by the decision of the District Court of Puerto Rico. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2 Cir. 1975).

## POINT V

**Discovery is not warranted under the facts of this case.**

The District Court of Puerto Rico found on the basis of uncontroverted affidavits that:

1. Carribean Carriers, Ltd. was not the owner of the M/V CARIBE.
2. Bordas Linea Dominicana, a corporation organized and existing under the Laws of the Dominican Republic was the owner of the M/V CARIBE.
3. The M/V CARIBE flew the Dominican flag.

4. At the time of the casualty, the M/V CARIBE was in transit between Colombia and Santo Domingo in the Dominican Republic.
5. The crew were all Colombian or Dominican who were all hired in Colombia or the Dominican Republic.
6. The M/V CARIBE had not been in any United States port for more than one year.
7. The base of the ship's operations was Santo Domingo, Dominican Republic.
8. Each and every one of the plaintiffs was a citizen of the Dominican Republic.

On the appeal to the Court of Appeals for the First Circuit, the plaintiffs conceded that on the facts presented, the dismissal by the District Court of Puerto Rico was justified.

In their brief, plaintiffs contend that they require discovery so that they can demonstrate sufficient American contacts in this case. Nothing, however, was submitted in the court below, nor brought to the attention of this Court which indicates that plaintiffs either have any such evidence, or can obtain or have any expectation of obtaining such evidence. It should be noted that the attorney for the plaintiffs in the within action was also the attorney of record in the action in the District Court of Puerto Rico (41a). Accordingly, what the plaintiffs are urging before this Court is the hope to establish by discovery that what was true in the Puerto Rican action is not true for the purpose of the within action. This is not a valid basis for relitigating the plaintiffs' claims in this Court or permitting the plaintiffs to claim one thing in one action and, after being unsuccessful, claiming the contrary. It seems fundamental that if a party elects to litigate a controversy on one state of facts and is un-



successful, it should not be permitted to relitigate the same controversy on a different state of facts and particularly facts which are diametrically opposed to those relied on in the initial litigation.

### CONCLUSION

**The judgment below should be affirmed in all respects.**

Respectfully submitted,

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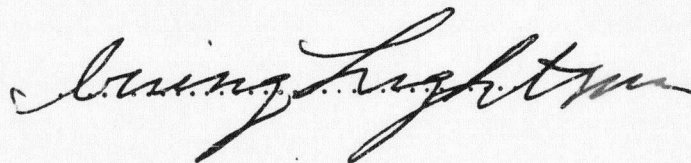
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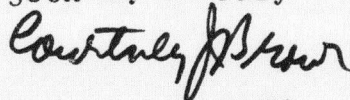
State of New York,  
County of New York,  
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 30th  
day of July, 1976, he served two copies of  
Appellees' Brief on  
Thomas M. Breen, Esq., the attorney  
for Appellants  
by delivering to and leaving same with a proper person in charge of  
his office at 160 Broadway  
in the Borough of Manhattan, City of New York, between  
the usual business hours of said day.



Sworn to before me this

30th day of July, 1976.



COURTNEY J. BROWN  
Notary Public, State of New York  
No. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1978